

ORIGINAL

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7645

EX PARTE OR LATE FILED

NEW YORK OFFICE
919 THIRD AVENUE
NEW YORK, NY 10022

March 9, 1999

RECEIVED

MAR 9 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington,, D.C. 20554


Re: RCN Telecom Services, Inc. Ex Parte Filing in CC Docket No. 98-184

Dear Secretary Salas:

Pursuant to Section 1.1206(b) of the Commission's rules and the Commission's Public Notice, DA 98-2035, enclosed please find an original and two copies of RCN Telecom Services, Inc.'s ("RCN's"), *ex parte* filing for inclusion in the above-referenced proceeding. The attached pleading of RCN was submitted in the Commission's proceeding seeking comments on Bell Atlantic's Report regarding its compliance with the Bell Atlantic/NYNEX merger conditions (File No. AAD 99-296). In its comments, RCN urges the Commission to take into consideration Bell Atlantic's noncompliance with the Bell Atlantic/NYNEX merger conditions in making its determination on Bell Atlantic's and GTE's application for approval of their merger.

If you should have any questions regarding this submission, please do not hesitate to contact us.

Very truly yours,


Robin F. Cohen
Kathy L. Cooper

Counsel for RCN Telecom Services, Inc.

cc: Janice Myles
ITS, Inc.
Joseph Kahl

No. of Copies rec'd 072
List A B C D E

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

MAR 9 1999

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)	
)	DA 99-296
Report of Bell Atlantic on)	File No. AAD 98-24
Compliance with the Bell Atlantic/)	
NYNEX Merger Order Conditions)	

COMMENTS OF RCN TELECOM SERVICES, INC.

Joseph Kahl
Director of Regulatory Affairs
RCN Telecom Services, Inc.
105 Carnegie Center
Princeton, NJ 08540
(609) 734-3827

Robin F. Cohn
Kathy L. Cooper
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500

Dated: March 8, 1999

SUMMARY

As demonstrated in RCN's comments, Bell Atlantic has not complied with the conditions set forth in the Commission's decision approving the Bell Atlantic/NYNEX merger. As a result, true local exchange competition still does not exist in the post-merger Bell Atlantic region.

As the Commission made clear in its decision approving the merger, Bell Atlantic's compliance with these conditions is essential to assuring that the merger does not harm the public interest and is critical to realizing competition in the local exchange market in Bell Atlantic's region. True competition, however, has yet to be attained by competitors in Bell Atlantic's region because Bell Atlantic has in fact not complied with -- and indeed has flagrantly disregarded -- these conditions as required under the Commission's decision. Specifically, Bell Atlantic's noncompliance is reflected in the many problems RCN has experienced with Bell Atlantic's services, problems ranging from OSS interfaces that do not process orders properly to Bell Atlantic's dismal performance in providing ordering, provisioning and network services.

In light of Bell Atlantic's failure to comply with the Bell Atlantic/NYNEX merger conditions, the Commission must impose more stringent enforcement measures on existing conditions and adopt additional conditions if it wants true local exchange competition to be realized. The Commission also should consider sanctions, such as the award of damages, imposition of forfeitures, and revocation of Bell Atlantic's operating authority. Finally, the Commission should consider Bell Atlantic's noncompliance with the Bell Atlantic/NYNEX merger conditions in connection with its review of the Bell Atlantic/GTE merger. In doing so, the Commission must find that the Bell Atlantic/GTE merger is not in the public interest.

TABLE OF CONTENTS

I.	THE COMMISSION'S BELL ATLANTIC/NYNEX MERGER ORDER	2
II.	EVIDENCE OF BELL ATLANTIC'S NONCOMPLIANCE WITH THE MERGER CONDITIONS	4
	A. Bell Atlantic's NonCompliance with OSS Interface Requirements (Condition No. 2)	4
	B. Bell Atlantic's Non-Compliance with OSS Interface Testing (Condition No. 3)	6
	C. Bell Atlantic's Non-Compliance with Good Faith Negotiations on the Establishment of Performance Standards (Condition No. 7)	7
III.	SUNSET PROVISION	9
IV.	PROPOSALS	9
V.	CONCLUSION	11

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	DA 99-296
Report of Bell Atlantic on)	File No. AAD 98-24
Compliance with the Bell Atlantic/ NYNEX Merger Order Conditions)	

COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by its undersigned attorneys and pursuant to the Commission's Public Notice, DA 99-296, released February 5, 1999, hereby submits these comments on the Report of Bell Atlantic on whether it has complied with the Bell Atlantic/NYNEX conditions ("Report") set forth in the Commission's Order approving the merger ("Merger Order").¹ As demonstrated in these comments, Bell Atlantic has not complied with the conditions set forth in the Commission's Merger Order. As a result, true local exchange competition still does not exist in the post-merger Bell Atlantic region.

In light of Bell Atlantic's failure to comply with the Merger Order conditions, the Commission must impose more stringent enforcement measures on existing conditions and adopt additional conditions in order to effect true local exchange competition in Bell Atlantic's region. These Commission actions are critical to the public interest. As noted in the Merger Order, the Commission also can consider sanctions, such as the award of damages, imposition of forfeitures,

¹ *In the Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, File No. NSD-L-96-10, FCC 97-286 (rel. Aug. 14, 1997).

and license revocation. Merger Order at para. 191. Finally, the Commission should consider Bell Atlantic's noncompliance with the Merger Order conditions in connection with its review of the Bell Atlantic/GTE merger. In doing so, the Commission must find that the Bell Atlantic/GTE merger is not in the public interest.

I. THE COMMISSION'S BELL ATLANTIC/NYNEX MERGER ORDER

In its decision approving the Bell Atlantic/NYNEX merger, the Commission held that significant barriers to entry into the local telecommunications market still remained and that the merger "on its terms alone" failed to meet the public interest standard. Merger Order at paras. 6, 12. Pursuant to the conditions that were imposed on Bell Atlantic/NYNEX, to which the applicants agreed, the Commission nonetheless found that the transaction was in the public interest (even though the Commission found it to be a "close case"). *Id.* at 12.

The Commission held that the Bell Atlantic/NYNEX merger would likely eliminate Bell Atlantic as a competitor to NYNEX and therefore would impede competition. Merger Order at para. 43. The Commission also found that barriers to entry were not sufficiently low that actual or potential competitors could offset the market power resulting from the merger. *Id.* at para. 46. The Commission therefore initially made a determination that the merger was not in the public interest. *Id.* at para. 48.

Realizing that the merger more than likely would not pass muster at the Commission, Bell Atlantic and NYNEX offered several commitments in exchange for approval of the transaction. Merger Order at para. 12. Thus, as a condition to approving the transaction, the Commission required Bell Atlantic and NYNEX to agree to these commitments, which are aimed at minimizing the negative effects of the merger. *Id.* at para. 113. The goal of these commitments is to "help to

mitigate the ability of the merged entity unilaterally to exercise market power” and “increase the ability of precluded firms to become significant market participants.” The conditions were designed to: (1) “reduce the risk to competitors of receiving inferior access and interconnection”; (2) “reduce the time and expense associated with OSS development”; (3) “make it more feasible to use unbundled transport facilities”; and (4) “facilitate the ability of competing carriers to make investment and pricing decisions based on a cost structure that more accurately reflects the true economic cost of the facilities and services obtained from Bell Atlantic-NYNEX.” *Id.*

As the Commission made clear in its Merger Order, Bell Atlantic’s compliance with these conditions is essential to assuring that the merger would not harm the public interest and is critical to realizing competition in the local exchange market in Bell Atlantic’s region. True competition, however, has yet to be attained by competitors in Bell Atlantic’s region because Bell Atlantic has in fact not complied with -- and indeed has flagrantly disregarded -- these conditions as required under the Commission’s Merger Order. RCN has experienced many problems with Bell Atlantic’s services, from OSS interfaces that do not process orders properly to Bell Atlantic’s dismal performance in providing ordering, provisioning and network services. Below, RCN provides the Commission with specific evidence of Bell Atlantic’s noncompliance with the merger conditions and outlines proposals for addressing this noncompliance.

II. EVIDENCE OF BELL ATLANTIC'S NONCOMPLIANCE WITH THE MERGER CONDITIONS

A. Bell Atlantic's NonCompliance with OSS Interface Requirements (Condition No. 2)

Included in the Bell Atlantic/NYNEX merger conditions is the requirement that Bell Atlantic provide "uniform interfaces for use by carriers purchasing interconnection to obtain access to operations support systems" throughout the Bell Atlantic/NYNEX region. Merger Order, Att. C at 2. These uniform interfaces are to include both a Graphical User Interface ("GUI")-based or other comparable interface and an EDI-based or comparable application-to-application interface. *Id.*

In its Report, Bell Atlantic claims that today every carrier operating in Bell Atlantic's region has available to it common interfaces that allow it to access OSS functions, including pre-ordering, ordering, maintenance and repair, and billing. Report at 4. These interfaces may be available in theory, but in the real world, they are, to put it bluntly, a dead letter. As a result, RCN has experienced devastating ordering problems, which have resulted in substantial delays and the loss of customers.

Bell Atlantic states that it offers carriers a Web-based GUI for both pre-ordering and ordering (Report at 6) and RCN does indeed utilize Bell Atlantic's Web-based GUI interface for placing its orders. Bell Atlantic's Report, however, fails to mention that this interface does not allow interconnecting carriers to access Bell Atlantic's operation support systems, as required. This is not a mere triviality, but goes to the heart of the purpose of this requirement. Without such access, the use of this interface has repeatedly resulted in considerable delay and a lengthy backlog of RCN orders.

For example, RCN has sought to connect its loop plant to the BA-NY house and riser cable that serves individual customers in multi-dwelling units. Although Bell Atlantic stated on February 1, 1999, that it was in compliance with OSS interface requirements, it was not until March 1, 1999 (a month after the "compliance" report), that BA-NY implemented a process for accepting and completing orders for house and riser cable combined with or without local number portability. Moreover, in February of this year, BA-NY instructed RCN not to submit such orders until March 15, 1999, because it did not expect to have a tested electronic process in place to accept and provision orders until that date. And, even though BA-NY *claims* to have solved that problem as of March 1, 1999, there are lingering questions as to the effectiveness of BA-NY's new ordering process.

While waiting for BA-NY to develop its ordering process, RCN has had to hold its orders to convert its resale customers to facilities-based service. In fact, to date, BA-NY has asked RCN to hold its orders for the house and riser cable and local number portability necessary to convert *several thousand* of RCN's resale customers to facilities-based service. In addition, RCN currently has a large number of requests from BA-NY customers to switch to RCN's facilities-based service. While BA-NY and RCN are currently negotiating how to deal with the huge backlog of house and riser cable and local number portability orders on a manual basis, it is clear that these and all new orders will continue to be delayed for a considerable period of time.

It is illustrative of the problems with BA-NY's provisioning of house and riser cable that six "new" customers that sought to subscribe to RCN's facilities-based local service at the end of January 1999 were without any wireline telephone service for as many as *sixteen days* as RCN's orders for house and riser cable languished. During this period, RCN supplied the customers with

cellular phones at its own expense. Nevertheless, as might be expected, three of the customers retreated to BA-NY notwithstanding RCN's extraordinary efforts to retain them.

BA-NY's failure to provision house and riser cable, with or without local number portability, in a timely and otherwise commercially reasonable manner has greatly hindered RCN's ability to compete in New York. Although BA-NY claims that it is currently working to develop a provisioning process, it will still have to test the process before it is fully operational, causing further delays for current and potential RCN customers. This obviously will discourage customers from subscribing to RCN's services, and is likely to have a lasting impact on RCN's (and other CLECs') reputation in the marketplace, since customers tend to blame the lesser-known newcomer rather than the incumbent for any problems.

Bell Atlantic claims that it "has met the requirement to deploy uniform interfaces . . . through the region within 15 months of merger approval." Report at 7. Deployment of malfunctioning and all-but-useless interfaces, however, does not meet this requirement. As noted above, Bell Atlantic's GUI interface, which it touts as a common interface for carriers throughout its region, still does not provide carriers with anything close to the pre-ordering and ordering access they need for meaningful competitive entity.

**B. Bell Atlantic's Non-Compliance with OSS Interface Testing
(Condition No. 3)**

Bell Atlantic also is required to conduct operational testing of the interfaces used by carriers purchasing interconnection to obtain access to OSS. Merger Order, Att. C at 3. As part of this requirement, Bell Atlantic is expressly required to be ready to commence this testing as soon as reasonably possible after receiving a request but no later than 45 days after the receipt of the request.

Id. Bell Atlantic also is required to provide evidence that its interfaces for obtaining access to OSS are capable of handling reasonable demands for ordering, provisioning, billing, maintenance and repair. *Id.* In its Report, Bell Atlantic claims that its systems have been able to process requests routinely. Report at 10. Yet, as RCN has demonstrated above, Bell Atlantic's interfaces are not capable of handling this demand and ordering requests are not being "processed routinely." To date, RCN still has a huge backlog of house and riser orders waiting to be processed by Bell Atlantic. As a result, RCN cannot provide its services to its customers and the substantial delay already has resulted in customers losing patience and migrating back to Bell Atlantic.

C. Bell Atlantic's Non-Compliance with Good Faith Negotiations on the Establishment of Performance Standards (Condition No. 7)

Bell Atlantic also is required to "engage in good faith negotiations with carriers purchasing interconnection in response to reasonable requests to establish performance standards." Merger Order, Att. C at 5. Performance standards must be established for pre-ordering, ordering, provisioning, billing, maintenance and repair, and network performance. *Id.* In addition, Bell Atlantic must establish appropriate enforcement mechanisms for ensuring compliance with these standards. In RCN's experience, however, Bell Atlantic's performance standards are not being met under the terms of the agreements between the parties and according to Bell Atlantic's own internal policies.

Bell Atlantic's performance has been particularly lackadaisical in the area of provisioning. For example, Bell Atlantic is not properly coordinating hot cuts, so RCN's customers are losing telephony service by either being disconnected too soon or by never being connected to RCN's network in the first place. Bell Atlantic service technicians routinely miss resale customer

appointments and fail to provide even the courtesy of notice to RCN and the customer, leaving RCN in the untenable position of having to make excuses to the customer for what is in fact inexcusable behavior by Bell Atlantic. In addition, Bell Atlantic's inadequate OSS systems and poorly trained employees greatly impede the conversion of resale customers to unbundled loops. RCN also has requested from Bell Atlantic certain OSS features, such as access to poles and conduit and collocation alternatives. Bell Atlantic has utterly neglected these requests.

In general, RCN has found it difficult to contact Bell Atlantic in order to address these issues. Bell Atlantic does not have a 24-hour contact person for its OSS GUI services to handle problems associated with these services. Moreover, the phone numbers Bell Atlantic has given for its contacts often have been incorrect or outdated.

Overall, Bell Atlantic's poor performance has undermined RCN's ability to provide high quality telecommunications services to its customers. The purpose of the performance standards was to "increase the likelihood that other entrants will be able to establish a brand reputation over time for providing high quality telecommunications services." Merger Order at 14. Instead, Bell Atlantic's acts and omissions have seriously undermined RCN's reputation -- and RCN is steadily losing customers to Bell Atlantic because of Bell Atlantic's failure to comply with performance standards for ordering, billing, provisioning, maintenance and repair, and network performance.

In its Merger Order, the Commission declined to adopt specific performance standards because it lacked the data at the time to establish the appropriate intervals for such standards. Merger Order at para. 215. It is clear, however, Bell Atlantic cannot be trusted to set and adhere to specific performance standards, and that the Commission must set them. The Commission should be able to establish such standards with the information provided in this proceeding. Because Bell

Atlantic's poor performance has a direct and negative impact on competitors' ability to provide competing services to consumers, the establishment of performance standards is critical to realizing competition in Bell Atlantic's region.

III. SUNSET PROVISION

In its Merger Order, the Commission concluded that Bell Atlantic's obligation to adhere to the commitments established in that decision would expire 48 months after the Commission's approval of the merger. Merger Order, Att. C at 5. At the time, the Commission believed that four years would be a sufficient amount of time for the conditions to have had a positive effect on competition in Bell Atlantic's region. This belief, however, is based on the assumption that the conditions would be met in a timely manner. They have not been met. As a result, consumers have not yet realized -- and will not realize for a considerable time to come -- the full benefits of a truly competitive local exchange market in the Bell Atlantic region. It is critical to the deployment of competition that the Commission extend this sunset provision for at least another two to four years.

IV. PROPOSALS

Although the Commission clearly cannot "unwind" the transaction, it can take other actions to mitigate Bell Atlantic's conduct which has harmed competition and consumers. First, the Commission can implement steps to more closely monitor Bell Atlantic's compliance with these conditions and take more stringent enforcement measures. Second, the Commission can impose sanctions on Bell Atlantic. For example, Bell Atlantic should be required to compensate carriers for the damages incurred to their business as a result of Bell Atlantic's actions. The Commission also should impose a substantial forfeiture on Bell Atlantic for each act of noncompliance. If Bell

Atlantic fails to meet these requirements or pay the necessary fines within a certain time frame, its operating authority should be revoked.


Finally, Bell Atlantic's actions in this case must be considered in the context of its proposed transaction with GTE. In its Merger Order, the Commission held that because its approval of the merger reduced the number of independently controlled large incumbent LECs, "future applicants bear an additional burden in establishing that a proposed merger will, on balance, be pro-competitive" and in the public interest. Merger Order at para. 16. The proposed transaction between Bell Atlantic and GTE would allow the merger of yet two more already dominant incumbent local exchange carriers, neither of which has made a commitment to the market opening measures required under the law. Bell Atlantic already has demonstrated that it will not adhere to the commitments that served as the basis for the Commission's approval of its transaction with NYNEX. The Commission cannot permit consummation of the transaction between Bell Atlantic, a carrier that refuses to open competition in its markets or to abide by obligations designed to open those markets, and GTE, another dominant local exchange carrier, with a nationwide practice and well-established history of anticompetitive behavior. In light of Bell Atlantic's and GTE's action, the proposed transaction clearly is contrary to the public interest.

V. CONCLUSION

For the foregoing reasons, the Commission must impose more stringent requirements on Bell Atlantic's existing conditions, such as extending the sunset provision, and should adopt additional conditions in order to achieve true local exchange competition in Bell Atlantic's region. The Commission should also impose on Bell Atlantic sanctions, such as the award of damages, imposition of forfeitures, and if necessary revocation of operating authority. Finally, in light of Bell Atlantic's continuing and willful noncompliance, the Commission should deny the application for approval of the Bell Atlantic/GTE transaction.

Respectfully submitted,

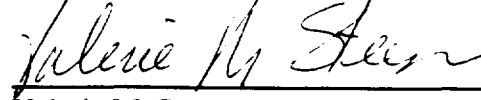
Joseph Kahl
Director of Regulatory Affairs
RCN Telecom Services, Inc.
105 Carnegie Center
Princeton, NJ
(609) 734-3827


Robin F. Cohn
Kathy L. Cooper
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500

Dated: March 8, 1999

CERTIFICATE OF SERVICE

I, Valerie M. Steen, hereby certify that on this 8th day of March, 1999, I served a copy of the foregoing Comments of RCN Telecom Services, Inc. in File No. AAD 98-24 by hand delivery or first-class mail on the following active parties:


Valerie M. Steen

Magalie Roman Salas (original + 4 copies)
445 12th Street, S.W.
Counter TWA 325
Washington, D.C. 20554

Debbie Byrd (4 copies)
Accounting Safeguards Division
2000 L Street, N.W.
Suite 201
Washington, D.C. 20554

International Transcription Service, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Marie Breslin
Director, Federal Relations
Bell Atlantic Federal Relations
1300 I Street, N.W.
Suite 400 West
Washington, D.C. 20005